SUPREME COURT OF APPEALS OF VIRGINIA.

In re NICHOLAS' WILL.

Nov. 12, 1914.

[83 S. E. 368.]

Wills (§ 129*)—Order to Produce—Jurisdiction.—Under Code 1904, § 2535, providing that any court, on being informed that a person has a will, may compel him to produce it, the circuit court had no jurisdiction to compel the beneficiary's attorney to deliver a will to the clerk of the court for safe-keeping, where no one was asking that this be done, or seeking its probate, and the beneficiary was willing that it should remain in the attorney's possession.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 334; Dec. Dig. § 129.*]

Error to Circuit Court, Rockingham County.

In the matter of the will of George M. Nicholas, deceased. From an order requiring that D. O. Dechert, attorney at law, deliver the will to the clerk of the circuit court, Dechert brings error. Reversed.

D. O. Dechert and *E. C. Martz,* both of Harrisonburg, for plaintiff in error.

Sipe & Harris, of Harrisonburg, for defendants in error.

HARRISON, J. This proceeding at law was inaugurated by the circuit court of Rockingham county upon its own motion, and resulted in a final order requiring D. O. Dechert, attorney at law, to deliver to the clerk of that court for safe-keeping a certain paper in his possession, purporting to be the will of George M. Nicholas, deceased. The propriety of the order mentioned is called in question by the present writ of error, which was awarded upon the petition of D. O. Dechert alleging that he is aggrieved thereby.

The record shows that George M. Nicholas died in August, 1912, under circumstances that excited the suspicion that he had been murdered, and an investigation developed the fact of arsenic in his stomach in quantities sufficient to have caused his death, which confirmed the suspicion that he had been foully dealt with. Several weeks after the death of Nicholas, Charles D. Harrison, the commonwealth's attorney of Rockingham county, received through the mail a package, addressed to the "prosecuting attorney," containing a writing purporting to be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

the last will of the deceased, under which one Ella McClendon, of Sturdivant, Mo., was the beneficiary. Ascertaining that Ella McClendon was an actual person, the commonwealth's attorney retained the paper, thinking that it might be useful in leading to the identification of the murderer of Nicholas, until he turned it over to D. O. Dechert, who, together with E. C. Martz, had been engaged by Ella McClendon as her counsel, with the understanding that it should be returned whenever the prosecuting attorney might need it in his official capacity. The paper had since remained exclusively in the possession of D. O. Dechert, attorney, until the order complained of, no steps having been taken on behalf of Miss McClendon to probate the writing, nor had she at any time asserted any rights thereunder, either in court or in pais.

In January, 1914, the heirs at law of George M. Nicholas presented to the judge of the circuit court of Rockingham county their bill, alleging that in 1913 sundry newspaper publications of the existence of the writing in question had appeared; that complainants had not seen the writing, but asserted that it was not the will of the decedent, Nicholas, and that if it purported to be a holographic will of the decedent it was a forgery; and that the paper constituted a cloud on the title to the estate of the decedent. The bill prayed that Miss McClendon and her attorneys be made defendants and required to produce the writing, and that the same should be canceled. Thereupon an injunction was granted restraining the attorneys of Miss McClendon from removing the writing beyond the jurisdiction of the court, and a rule awarded requiring them to show cause why they should not produce the same and file it with the clerk of the court.

In answer to this rule it was insisted that the prayer for the production of the document was in the nature of a prayer for discovery, which was not enforceable in a proceeding by rule, even in a case where equity could compel discovery; that the defendant attorneys had no personal interest in the controversy, and that any process against them, except as witnesses, could only be operative upon their client; that upon the assumption of the truth of the allegations of the bill the writing constituted evidence which might be used against Miss McClendon as tending to incriminate her upon a charge of forgery, so that she was privileged against its production, under the rule against self-incrimination, and that this privilege extended to prevent its being taken from the possession of her attorneys; that the bill was without equity, because the validity of a will was not triable in chancery upon a bill of the character here involved, even upon an allegation that the same was fraudulent; that the bill did not

allege any fact constituting ground for apprehension that the writing would be transmitted beyond the jurisdiction of the court, nor were its allegations sufficient to show that the writing constituted a cloud upon title; and that it was not alleged, nor was it true, that any of the defendants published, caused to be published, inspired, or were in any way responsible for, the newspaper publications mentioned.

Upon the hearing of this chancery cause and the motion therein to quash the rule requiring the attorneys of Miss McClendon to show cause why they should not produce and file the writing with the clerk, the circuit court announced that it would consider the propriety of making an order on the law side of the court requiring the production of the writing under the provisions of section 2535 of the Code, and thereupon proceeded at law, without request for such action, to call the commonwealth's attorney, who testified to the facts and circumstances attending his receipt of the paper, to draw from D. O. Dechert an admission that the writing in question was in his possession in his capacity as attorney at law for Miss McClendon, and to consider as evidence in the law proceeding the chancery suit mentioned. Upon the facts thus arrived at, the order in the law proceeding complained of was entered.

This was an unusual proceeding, without precedent so far as we have been able to discover, certainly in this jurisdiction. The authority invoked by the court in support of its action was section 2535 of the Code of 1904, which is as follows:

"Any such court, on being informed that a person has in his custody the will of a testator, may summon him, and by proper process compel him to produce the same."

This section appears in the midst of and as one of the provisions of the Code of 1904 relating to wills and probate proceedings; and it occurs in substantially the same language and setting in our statutes from a very early day in the history of the commonwealth.

With deference to the learned judge of the circuit court, we are unable to perceive that this section furnishes any warrant for the action complained of. When the language of the section is alone read, it does not seem to have been intended as an original and independent remedy, but merely to afford an ancillary means of facilitating the probate of wills. This construction appears manifest when the section is read in the light of those surrounding it in the chapter on wills and their probate. The section clearly contemplates a probate proceeding in which the court, when informed that a person has in his custody the will of a testator, is given power to compel its production, so that, on the motion for probate, the matter may be determined;

otherwise, to what end is the will, or paper purporting to be one, to be produced? Section 2535 provides only for the production of the document. What is to be done with it in a case like the present, when no one, beneficiary or other person, is seeking its probate? The effect of the circuit court's action was to add another provision to the statute under which the court could compel the production of a paper—not for probate, but for the sole purpose of having it safely kept by the clerk of the court, although no one was asking that it be done, and the beneficiary was satisfied of its safety in the repository from which it was taken.

We are of opinion that this original proceeding at law for the sole purpose of requiring D. O. Dechert to transfer the custody of this paper from himself, at attorney for Miss McClendon, to the clerh of the circuit court of Rockingham for safe-keeping, was, under the circumstances of this case, without warrant of law.

The circuit court being without authority to enter the order complained of, it is unnecessary to consider whether or not it was in violation of the privilege of Miss McClendon against self-incrimmation.

The order complained of must be reversed, and this court will enter an order dismissing the ex parte common-law proceedings, without costs.

Reversed.

Note.

See editorial, post, p. 707.

ADAMS *v.* PUGH'S ADM'R.

Nov. 12, 1914.

[83 S. E. 370.]

1. Judgment (§ 565*)—Conclusiveness—Dismissal without Prejudice.—The dismissal of a petition by one of two joint debtors, seeking to recover the other debtor's share of a payment on the joint debt, without prejudice to his right to institute such action as he might be advised to bring for the maintenance of his rights, was not a final adjudication of the matter in controversy.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1177-1179; Dec. Dig. § 565.*]

2. Judgment (§ 713*)—Conclusiveness—Matters Concluded.—In a

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.